PP

v.

MEGAT SHAHRIZAT MEGAT SHAHRUR

COURT OF APPEAL, PUTRAJAYA
SURIYADI HALIM OMAR JCA
HASAN LAH JCA
AHMAD MAAROP JCA
[CRIMINAL APPEAL NO: W-05-84-2008]
18 JANUARY 2011

CRIMINAL LAW: *Penal Code - Section 302 - Murder - Charge amended by trial judge to one of culpable homicide not amounting to murder - Appeal against - Whether trial judge erred - Whether case against accused fell under s. 300(c) and not under s. 299 Penal Code - Intention of accused to cause fatal injuries found on victim - Whether proven - Penal Code, ss. 299, 300(c), 302, 304(a)*

The respondent ('Megat') was charged with the murder of a child ('Shahira'), an offence punishable under s. 302 of the Penal Code ('Code'). At the close of the prosecution's case, the High Court amended the charge to one of culpable homicide not amounting to murder, an offence punishable under s. 304(a) of the Code. Megat pleaded guilty to the amended charge and was convicted and sentenced to 15 years' imprisonment. The Deputy Public Prosecutor ('DPP') appealed against that decision, contending that the trial judge erred in concluding that Megat's acts which caused Shahira's death were done with the intention of causing such bodily injury as was likely to cause death provided under s. 299 of the Code. It was the DPP's submission that having regard to the facts and circumstances of the case, particularly the nature and gravity of the injuries inflicted on Shahira, Megat's acts were done with the intention of causing bodily injury which was sufficient in the ordinary course of nature to cause death, bringing the case against him under s. 300(c) of the Code.

Held (dismissing the appeal)
Per Ahmad Maarop JCA delivering the judgment of the court:

(1) Under s. 300(c) of the Code it is not enough to prove that the injury found to be present is sufficient in the ordinary course of nature to cause death. In addition, it must also be

proved that the injury found to be present is the injury intended by the accused. Reverting to the instant appeal, the DPP contended (as she did before the trial judge) that she had proved the offence of murder against Megat under s. 300(c) of the Code. The injuries present on Shahira's body were established by the evidence of the forensic pathologist, which the trial judge accepted. On the evidence before the court, there was no doubt that the injuries found on Shahira were sufficient in the ordinary course of nature to cause death. The crucial question for determination was, therefore, whether Megat had intended to inflict those fatal bodily injuries *ie*, that they were not accidental or unintentional or that some other kind of injuries were intended. In the court below, this was a question of fact for the trial judge based on the evidence before her. On the facts, there was no evidence found by the trial judge that would lead her to the inevitable conclusion that the fatal injuries found to be present on Shahira were the injuries intended by Megat. There was no reason to disagree with her finding. Having considered the totality of the evidence in the instant case, this court was not convinced that the trial judge was wrong in concluding that Megat's act was done with the intention of causing such bodily injury as was likely to cause death as provided under s. 299 of the Code. *State of AP v. R Punnayya* (dist); *Aziz Mat Shah v. PP* (dist).

[Respondent's conviction and sentence affirmed.]

Bahasa Malaysia *Translation Of Headnotes*

Responden ('Megat') telah dituduh membunuh seorang kanak-kanak ('Shahira'), suatu kesalahan di bawah s. 302 Kanun Keseksaan ('Kanun'). Pada penghujung kes pendakwaan, Mahkamah Tinggi meminda pertuduhan kepada pertuduhan homisid salah yang tidak menjumlahkan kepada pembunuhan, suatu kesalahan yang dapat dihukumi di bawah s. 304(a) Kanun. Megat memplid bersalah kepada pertuduhan yang dipinda dan telah disabit dan dihukum kepada 15 tahun dalam penjara. Timbalan Pendakwa Raya ('TPR') merayu terhadap keputusan tersebut, dan menghujah bahawa hakim bicara khilaf dalam memutuskan bahawa tindakan Megat yang mengakibatkan kematian Shahira telah dilakukan dengan niat menyebabkan kecederaan badan yang akan

mengakibatkan kematian seperti diperuntukan di bawah s. 299 Kanun. Ia adalah hujahan TPR bahawa memandangkan fakta dan keadaan kes, terutamanya sifat dan beratnya kecederaan yang dikenakan ke atas Shahira, tindakan Megat dilakukan dengan niat menyebabkan kecederaan badan yang mencukupi dalam keadaan biasa untuk menyebabkan kematian, yang membawa kes terhadapnya di bawah s. 300(c) Kanun.

Diputuskan (menolak rayuan)
Oleh Ahmad Maarop HMR menyampaikan penghakiman mahkamah:

(1) Di bawah s. 300(c) Kanun ia tidak cukup untuk membuktikan bahawa kecederaan yang ada mencukupi dalam keadaan biasa untuk menyebabkan kematian. Tambahan lagi, ia juga mesti dibuktikan bahawa kecederaan yang terdapat adalah kecederaan yang diniatkan oleh tertuduh. Kembali kepada rayuan semasa, TPR menghujah (seperti yang dibuat olehnya di hadapan hakim bicara) bahawa beliau telah membuktikan kesalahan membunuh terhadap Megat di bawah s. 300(c) Kanun. Kecederaan yang terdapat pada badan Shahira telah dibuktikan oleh keterangan ahli patologi forensik, yang hakim bicara telah menerima. Berdasarkan keterangan di hadapan mahkamah, tiada keraguan bahawa kecederaan yang dijumpai pada Shahira adalah mencukupi dalam keadaan biasa untuk mengakibatkan kematian. Soalan penting untuk ditentukan adalah, oleh itu, sama ada Megat telah berniat mengenakan kecederaan badan fatal tersebut, iaitu, bahawa kecederaan bukanlah secara tidak sengaja atau tidak diniatkan atau bahawa kecederaan yang lain telah diniatkan. Dalam mahkamah bawahan, ini merupakan suatu soalan fakta bagi hakim bicara berdasarkan keterangan di hadapannya. Berdasarkan fakta, tidak ada keterangan yang dijumpai oleh hakim bicara yang akan membawanya kepada kesimpulan yang tidak dapat dielakkan bahawa kecederaan fatal yang terdapat pada Shahira adalah kecederaan yang diniatkan oleh Megat. Tidak ada apa-apa sebab untuk tidak menyetujui dengan dapatannya. Setelah menimbangkan keseluruhan keterangan dalam kes semasa, mahkamah ini tidak yakin bahawa hakim bicara telah khilaf apabila memutuskan bahawa tindakan Megat dilakukan dengan niat mengakibatkan kecederaan badan yang akan menyebabkan

A kematian seperti yang diperuntukan di bawah s. 299 Kanun. *State of AP v. R Punnayya* (dibezakan); *Aziz Mat Shah v. PP* (dibezakan).

[Sabitan dan hukuman responden disahkan.]

B **Case(s) referred to:**
Aziz Mat Shah v. PP [2010] 4 CLJ 305 CA ***(dist)***
Chan Kwee Fong v. PP [2010] 3 CLJ 671 CA ***(refd)***
Mimi Wong & Anor v. PP [1972] 1 LNS 88 HC ***(refd)***
Nor Hasnizam Ab Latif v. PP [2002] 1 CLJ 49 CA ***(refd)***
C *PP v. Visuvanathan [1977] 1 LNS 103* ***(refd)***
State of AP v. R Punnayya AIR [1977] ***(dist)***
Tan Boon Teck v. PP [1949] 1 LNS 89 HC ***(refd)***
Tan Buck Tee v. PP [1961] 1 LNS 130 HC ***(refd)***
Tham Kai Yau & Ors v. PP [1976] 1 LNS 159 FC ***(refd)***
Virsa Singh v. State of Punjab [1958] AIR SC 465 ***(refd)***
D

Legislation referred to:
Penal Code, ss. 299, 300(c), 302, 304(a)

Penal Code [Ind], s. 300

E *For the appellant - Samihah Rhazali DPP*
For the respondent - Ab Kadir Ismail; M/s Ab Kadir Ismail

[Appeal from High Court, Kuala Lumpur; Criminal Trial No: 45-5-2002]

Reported by Suresh Nathan
F

JUDGMENT

Ahmad Maarop JCA:
G

Introduction

[1] The respondent – Megat Shahrizat bin Megat Shahrur ("Megat") was charged with the murder of one Nur Izzatul Shahira bte Rozilan ("Shahira") at the time and place stated in the
H charge, an offence punishable under s. 302 of the Penal Code. At the close of the case for the prosecution, the High Court amended the charge to one of culpable homicide not amounting to murder an offence punishable under s. 304(a) of the Penal
I Code. Megat pleaded guilty to the amended charge, was convicted and sentenced to 15 years imprisonment to take effect from the date of his arrest. The Public Prosecutor preferred an appeal to this court against the whole of the aforesaid decision.

The Prosecution's Case

[2] The substance of the evidence led by the prosecution is as follows. Shahira was the daughter of Sarimah bte Malik (SP4) with her estranged husband who was at the material time an inmate in a drug rehabilitation centre. SP4 and Megat had been lovers since 1995 and they were living together in Sri Suajaya Condominium with two other persons – Wan Ardy b. Wan Yusuff (SP5) and Nordin bin Ahmad (SP7).

[3] SP4 was the chief tenant and occupied the master bedroom in the condominium with Megat. SP5 and SP7 occupied the two other rooms in the condominium. Shahira did not stay at the condominium. She stayed in Jelatek Keramat, Kuala Lumpur with SP4's mother (SP6) who was looking after her. SP6 would bring Shahira to the condominium twice a week for visits, and sometimes Shahira would stay overnight at the condominium. At the material time SP4 was working as a GRO at the Istana Dangdut, and her working hours were from 10.30pm to 3am daily. Megat was unemployed. Whenever Shahira stayed overnight at the condominium and SP4 had to go to work, Megat would help to take care of Shahira and she would sleep in the master bedroom. Megat was close to Shahira and she called him "ayah". Infact Megat loved Shahira as though Shahira was his own daughter. He was also concerned about Shahira's physical needs such as diapers and milk and would often ask SP4 to take Shahira from SP6's house to the condominium. Megat had never complained to SP4 about Shahira's behaviour.

[4] On 3 June 2001, at about 3pm, SP4, Megat, Megat's brother and sister and their spouses went out to Yow Chuan Plaza to celebrate Megat's birthday at the Family karaoke there. SP4 took Shahira along. The birthday party ended at about 6pm. SP4 wanted to send Shahira back to her mother's house but Megat suggested that SP4 bring Shahira back to stay overnight at the condominium as he wanted to take her to an exhibition at Bukit Jalil the next day. After that the same group went to have dinner at Setapak. After dinner they returned to the condominium. On arrival at the condominium, Shahira who had fallen asleep in the car, was carried up to the condominium and put on a long sofa in the hall where she continued to sleep. When they came back, SP5 and SP7 were in the condominium.

A SP4 went into her room to change and to get ready to go to work. At about 10pm SP4 came out of her room and saw Shahira still sleeping on the sofa. She then left for work in Megat's brother's car together with his sister and sister in law. After they left, only Megat, Shahira and SP7 were in the condominium.

B

[5] SP7's testimony provided the only direct evidence of the events leading to the Shahira's death. The substance of SP7's evidence is as follows. After SP4 left for work, SP7 took some dirty plates and glasses on the table to bring them to the kitchen.
C On the way to the kitchen, he saw Megat and Shahira walking out of the kitchen. Shahira looked normal and was walking on her own and was tailing Megat. When SP7 came back from the kitchen to the hall, he saw Shahira and Megat sitting on the 4-seater sofa in the hall. Shahira was crying at that time and Megat
D was scolding her. SP7 saw Megat slapping Shahira on the mouth and her cheeks and told her to keep quiet, but he could not remember how many times Megat had slapped Shahira's mouth. He called out to Shahira to come to him but Megat got angry and pulled Shahira towards himself. He heard Megat scolding Shahira
E "oh tadi petang masa parti harijadi dengan orang lain kamu mahu tapi dengan saya kamu takut. Awak degil ke, saya panggil kamu tidak mahu orang lain panggil kamu mahu". SP7 said he chided Megat "Gat, kamu gilakah pukul budak itu macam itu". At that juncture, Shahira climbed down from the sofa and wanted to come
F to SP7 but Megat hit her on the thighs and Shahira continued to cry. Megat then carried Shahira and put her back on the sofa and said to Shahira "kamu degil kah dengan orang lain kamu mahu dengan saya kamu takut dan tidak mahu". At that time Shahira was still crying. At that juncture, SP7 saw Megat take a cushion
G from the four-seater sofa, folded it and put it over Shahira and proceeded to sit on her. SP7 was not sure whether Shahira was sitting or lying on the sofa at that time as he was watching television before that. SP7 said he chided Megat "Gat, awak gilakah buat budak itu begitu". Megat's reply was "awak jangan
H risaulah, dia ini tahan lasak, dia masih kuat lagi". After that, Megat got up from the cushion. SP7 was not certain whether Megat sat very hard or gently on Shahira but he could hear Shahira crying below the cushion. Then, Megat held Shahira's hand and led her to the master bedroom. At that time Shahira was still crying.

I

[6] SP7 said he continued to watch television in the hall. After a while he felt sleepy and decided to go to bed. While walking to his room he could see into the master bedroom as its door was ajar and he could hear Megat asking Shahira to take off her clothes. SP7 then called out to Megat and said "ok lah Gat, saya nak pergi tidurlah". While he was lying on his bed and before dozing off SP7 heard a loud sound coming from the bedroom of the master bedroom. The sound was like something falling but he could not remember how many times he heard the sound. At about 3-4am next morning SP7 was awakened by some people who brought him to the Kuala Lumpur General Hospital (GHKL). He could not remember who these people were and what they said to him. At the hospital he met SP5 who told him that Shahira had passed away.

[7] SP5's account of what happened on that date is as follows. On 3 June 2001 at about 8pm, he left the condominium to go to Bangsar for dinner with a few friends and came back to the condominium at about 12am. When he entered the condominium, the hall was in darkness. When he switched on the hall light he saw Megat and Shahira sleeping on the floor in the hall. He proceeded to sit on the sofa in the hall to watch TV. After a while Megat got up and said he wanted to bring Shahira to sleep into the master bedroom. He then saw Megat carrying Shahira with both hands under her armpits into the master bedroom. At that time Shahira's eyes were closed and she looked as though she was sleeping. After Megat and Shahira went into the master bedroom, SP5 decided to take his bath in the bathroom in the kitchen. At about 1.30am, Megat knocked on the door of his room and asked for his help to bring Shahira to the hospital. Megat then went back to the master bedroom and carried Shahira out of the master bedroom and put her on the sofa seat but she toppled over as soon as he put her on the sofa. Shahira looked very pale and her eyes were closed at that time. SP5 asked Megat what happened and the latter answered that Shahira had asthma. Megat then carried Shahira, and together they went down to the guard house and managed to get the help of a security guard to send Shahira to GHKL in a Pajero. Shahira was sent straight to the Emergency Unit at about 2.30am and was attended to by a doctor on duty – Dr. Teo Aik Howe (SP1). During the admission SP1 asked SP5 what had happened to Shahira and SP5 told SP1

that she had asthma as told by Megat. SP1 went into the emergency room and came out and told them that Shahira was not having asthma. SP5 asked Megat what actually happened and Megat told him that when he was washing clothes in the bathroom he slipped and fell on top of Shahira who was standing beside him at that time.

[8] In his evidence, SP1 said that Shahira was brought to the Emergency Unit on 4 June 2001 at about 2.40am. On admission, Shahira was not breathing and had no pulse rate. SP1 immediately applied cardio pulmonary resuscitation (CPR) for about half an hour but could not revive her. After about 35 minutes the ECG showed no electrical activity of the heart. At about 3.13am SP1 pronounced Shahira dead. SP1 said that while treating Shahira he had examined her body and found some bruises on her lower lip area between the inguinal – the area between the thigh and body.

Decision

[9] The Public Prosecutor's complaint before us was that the learned trial judge erred in law and in fact in amending the murder charge against Megat to one of culpable homicide not amounting to murder punishable under s. 304(a) of the Penal Code. The thrust of the learned Deputy's submission before us was that the learned trial judge erred in concluding that Megat's act which caused Shahira's death in this case was done with the intention of causing such bodily injury as was likely to cause death provided under s. 299 of the Penal Code. She contended that having regard to the facts and circumstances of the case, particularly the nature and gravity of the injuries inflicted on Shahira, Megat's acts which caused Shahira's death was done with the intention of causing bodily injury which was sufficient in the ordinary course of nature to cause death, bringing the case against him under s. 300(c) of the Penal code. In support of her submission she relied on *Tan Boon Teck v. PP* [1949] 1 LNS 89, *Virsa Singh v. State of Punjab* [1958] AIR SC 465, *Nor Hasnizam Ab Latif v. PP* [2002] 1 CLJ 49 and *Tan Buck Tee v. PP* [1961] 1 LNS 130. For reasons which we will set out in a moment, we are unable to accept the Public Prosecutor's contention.

[10] The submission brings into focus again the distinction between the provisions under s. 299 and s. 300(c) of the Penal Code.

[11] Section 299 of the Penal Code provides: A

> Whoever causes death by doing an act with the intention of causing death, or with the intention of causing such bodily injury as is likely to cause death, or with the knowledge that he is likely by such act to cause death, commits the offence of culpable homicide. B

[12] Section 300(c) of the Penal Code provides:

> Except in the cases hereinafter excepted, culpable homicide is murder: C
>
> (c) if it is done with the intention of causing bodily injury to any person, and the bodily injury intended to be inflicted is sufficient in the ordinary course of nature to cause death;

[13] The net effect of the provisions under s. 299 and 300(c) of the Penal Code is that it is culpable homicide if the bodily injury intended to be inflicted is likely to cause death; it is murder, if such injury is sufficient in the ordinary course of nature to cause death. It is on a comparison of these two limbs of s. 299 and s. 300 that the decision of doubtful cases must generally depend. The distinction is fine, but noticeable. In the last analysis, it is a question of degree of probability (see *Tham Kai Yau & Ors v. PP* [1976] 1 LNS 159 FC). The degree of probability here is the degree of probability of death. Explaining the degree of probability of death in the context of s. 299 and the third limb of s. 300 of the Indian Penal Code (which is in *pari materia* with section 299 and s. 300(c) of our Penal Code), the Supreme Court of India said in *State of A.P. v. R. Punnayya* AIR [1977], Supreme Court 45: D E F

> The difference between clause (b) of sec. 299 and clause (3) of Section 300 is one of the degree of probability of death resulting from the intended bodily injury. To put it more broadly, it is the degree of probability of death which determines whether a culpable homicide is of the gravest, medium or the lowest degree. The word "likely" in clause (b) of Section 299 conveys the sense of 'probable' as distinguished from a mere possibility. The words 'bodily injury ... sufficient in the ordinary course of nature to cause death' mean that death will be the "most probable" result of the injury, having regard to the ordinary course of nature. G H

[14] How the third limb of s. 300 of the Indian Penal Code was to be applied was explained by the Indian Supreme Court in the oft cited case of *Virsa Singh v. State of Punjab (supra)*: I

In our opinion, the two clauses are disjunctive and separate. The first is subjective to the offender:

if it is done with the intention of causing bodily injury to any person.

It must, of course, first be found that bodily injury was caused and the nature of the injury must be established, that is to say, whether the injury is on the leg or the arm or the stomach, how deep it penetrated, whether any vital organs were cut and so forth. These are *purely objective facts* and leave no room for inference or deduction: to that extent the enquiry is objective; *but when it comes to the question of intention, that is subjective to the offender and it must be proved that he had an intention to cause the bodily injury that is found to be present.*

(10) Once that is found, the enquiry shifts to the next clause:

"and the bodily injury intended to be inflicted is sufficient in the ordinary course of nature to cause death."

The first part of this is descriptive of the earlier part of the section, namely, the infliction of bodily injury with the intention to inflict it that is to say, *if the circumstances justify an inference that a man's intention was only to inflict a blow on the lower part of the leg, or some lesser blow, and it can be shown that the blow landed in the region of the heart by accident, then, though an injury to the heart is shown to be present, the intention to inflict an injury in that region, or of that nature, is not proved.* In that case, the first part of the clause does not come into play. But once it is proved that there was an intention to inflict the injury that is found to be present, then the earlier part of the clause we are now examining:

and the bodily injury intended to be inflicted

Is merely descriptive. *All it means is that it is not enough to prove that the injury found to be present is sufficient to cause death in the ordinary course of nature; it must in addition be shown that the injury is of the kind that falls within the earlier clause, namely, that the injury found to be present was the injury that was intended to be inflicted.* Whether it was sufficient to cause death in the ordinary course of nature is a matter of inference or deduction from the proved facts about the nature of the injury and has nothing to do with the question of intention. (emphasis added).

[15] Explaining how intention under the third limb of s. 300 of the Indian Penal Code was to be decided, the Indian Supreme Court in *Virsa Singh* said:

> *In considering whether the intention was to inflict the injury found to have been inflicted, the enquiry necessarily proceeds on broad lines as, for example, whether there was an intention to strike at a vital or a dangerous spot, and whether with sufficient force to cause the kind of injury found to have been inflicted.* It is, of course, not necessary to enquire into every last detail as, for instance, whether the prisoner intended to have the bowels fall out, or whether he intended to penetrate the liver or the kidneys or the heart. Otherwise, a man who has no knowledge of anatomy could never be convicted, for, if he does not know that there is a heart or a kidney or bowels, he cannot be said to have intended to injure them. Of course, that is not the kind of enquiry. It is broad-based and simple and based on commonsense: the kind of enquiry that "twelve good men and true" could readily appreciate and understand".

[16] Virsa Singh is followed in Malaysia (for example see *Chan Kwee Fong v. PP* [2010] 3 CLJ 671 CA. *Aziz Mat Shah v. PP* [2010] 4 CLJ 305). Virsa Singh is also followed in Singapore (See *PP v. Visuvanathan* [1977] 1 LNS 103, *Mimi Wong & Anor v. Public Prosecutor* [1972] 1 LNS 88).

[17] Thus, under s. 300(c) of the Penal Code it is not sufficient to prove that the injury found to be present is sufficient in the ordinary course of nature to cause death. In addition, it must also be proved that the injury found to be present was the injury that was intended by the accused. Reverting to the instant appeal, the Public Prosecutor contended (as he did before the trial judge) that he had proved the offence of murder against Megat under s. 300(c). The injuries present on the body of Shahira were established by the evidence of the forensic pathologist – Hamidah bte Abdul Jalil (SP8), who performed an autopsy on her body, and whose evidence was accepted by the learned trial judge. The details of the injuries are also revealed in SP8's autopsy report (P8). SP8 found superficial abrasion of 1 x 1cm with surrounding contusion of upper surface of the lower lip situated to the left of the midline. She also found several contusions on Shahira's chest and abdomen, right upper limb and as well as lower limbs. On internal post-mortem, she found that Shahira's scalp showed effusion of blood (subgaleal haematoma) 4 x 3cm over the left back of the head. She found that the brain was softened and swollen which according to her could be due to either a fall or blunt trauma. She found that the left lobe of the liver showed a

A tear (rupture) of 8cm in length extending into the parenchyma with presence of sub capsular haematoma over 3 x 1cm area on the under surface of the right lobe of liver. She also found that the pancreas was cut into two with surrounding bleeding. She opined that these injuries were the result of blunt trauma. She
B concluded that the cause of death was rupture of the liver and pancreas due to a blunt trauma. On the evidence before the court (upon purely objective enquiry following *Virsa Singh*), there is no doubt that the injuries found on Shahira (the rupture of the liver and the pancreas) were sufficient in the ordinary course of nature
C to cause death. The crucial question for the determination of the court was therefore whether Megat had intended to inflict those fatal bodily injuries – that is to say, that they were not accidental or unintentional, or that some other kind of injuries were intended. In the court below this was a question of fact for the decision of
D the learned trial judge based on the evidence before her. The enquiry proceeds on broad lines as, for example, whether there was an intention to strike at a vital or a dangerous spot, and whether with sufficient force to cause those kind of injuries (See *Virsa Singh* para. 16). As an illustration, in *R. Punnayya (supra)*, in
E undertaking this subjective enquiry whether the accused had the intention to inflict the injury found to be present, the court took into account that the accused had a motive to beat the deceased, the attack was premeditated and pre planned, lethal weapon was used, the unusually fierce, cruel and sadistic manner the beating
F was executed, the helplessness state of the unarmed victim, the intensity of the violence caused and the callous conduct of the accused in persisting in the assault even against the protest of feeling bystanders. All these elements considered cumulatively led the court to the irresistible conclusion that the injuries caused by
G the accused to the deceased was intentional. (see para. 34). None of the elements found in *R. Punnaya* as aforesaid is available on the evidence presented in the instant case. To illustrate the point further, reference may be made to *Aziz Mat Shah v. PP* [2010] 4 CLJ 305, where in convicting the accused of the murder of a
H three year old girl, the High Court relied on s. 300(c) of the Penal Code. In that case one of the eyewitnesses testified that he saw the accused slap the deceased's face several times, before grabbing the deceased's left shoulder and punching her with his right hand. Then, while the deceased was on the bed, PW5 saw the accused
I punching the deceased's chest and stomach several times in a

forceful manner. Then, PW5 saw the accused covering the deceased's face with a pillow on the bed until the deceased stopped crying. According to SP5, the deceased was shivering restlessly ("menggelupur") and she was last seen alive when she asked for water from the bed. PW6, another witness who was present at the scene at the material time, corroborated PW5's testimony as to what happened. According to PW6, he saw the accused slapping the deceased several times on her face. Later, the accused punched the deceased when she refused to eat when the accused tried to feed her. The accused then started slapping the deceased's stomach and chest. The accused also used a pillow to cover the deceased's face. The accused slapped the deceased many times forcefully. The accused also grabbed the deceased's hair and began punching the deceased many times in a forceful manner. The accused continued to punch the deceased despite PW6's plea to the accused to stop. PW6 said that the accused had used a pillow found on the bed to cover the deceased's face before the deceased stopped crying. According to PW6, even before that day, he used to see the accused hitting the deceased. The forceful blows on the deceased's abdomen contributed to the cause of the deceased's death. The cautioned statement of the accused was also found to support the prosecution's case that the accused intended to inflict those forceful blows on the deceased. In the light of the clear and very compelling evidence as aforesaid, the court had no difficulty in concluding that the intention specified under s. 300(c) of the Penal Code had been proven. No such evidence as was available in *Aziz Mat Shah v. PP* was found by the learned trial judge in the instant case to lead her to the inevitable conclusion that the fatal injuries found to be present on Shahira were the injuries intended by Megat. Although SP7's evidence provided the narrative which unfolded the events taking place in the hall of the condominium on the material date and time, there was no evidence to show how long Megat had sat on Shahira, the degree of force applied by Megat as well as the exact position of Shahira when the force was applied on her. Those elements, if established by evidence would surely had assisted the learned trial judge in determining whether the fatal injuries were intended by Megat. However, SP7's evidence did not reveal those vital elements which the learned trial judge was looking for. This is what the learned trial judge said in her judgment:

A B C D E F G H I

A It is clear that there was no evidence on how long the accused had sat on the deceased and whether he had applied his whole body weight on the deceased or merely did it softly. It was clear that SP7 was not certain of the position of the deceased, whether she was sitting or lying down on the sofa when the accused sat on her. Obviously the impact would be greater if the deceased B was lying down completely flat on the sofa as the pressing impact on the two organs would be more direct than if she was seated up. The fact that the sofa cushion could be folded showed that it was quite soft and could have cushioned the impact of the accused's body weight on the deceased. The mild manner of C SP7's reproach of the accused, that "awak gila kah buat macam tu kepada budak itu" and the accused's reply "jangan risaulah dia ini tahan lasak", showed that whilst SP7 was disapproval of accused's behaviour, he certainly did not think the situation was serious enough to warrant his intervention beyond calling out to the deceased to come to him. D

In other words, based on the totality of the evidence before me, I was unable to make a positive finding that the accused had the *mens rea* stated in paragraph (c) of section 300 of the Penal Code as relied upon by the prosecution. The learned DPP had E submitted that this case was identical with the case of *PP v. Aziz Mat Shah* [2004] 7 CLJ 226 in which the accused was convicted of murder of a 3 year old child. However a perusal of the facts in that case shows that in that case there were direct evidence from the accused's two younger brothers who had witnessed the accused slapping the deceased, punching her stomach and chest F hard and used a pillow to cover the deceased's face before the deceased had stopped crying. My view is that *Aziz Mat Shah*'s case is totally different from the facts in this case and could be distinguished based on the facts.

G We find no reason to disagree with the learned trial judge's finding. Having considered the totality of the evidence in the instant case ourselves we are not convinced that the learned judge was wrong when she concluded that Megat's act was done with the intention of causing such bodily injury as was likely to cause H death as provided under s. 299 of the Penal Code.

[18] In the result the Public Prosecutor's appeal is dismissed. Megat's conviction under s. 304(a) of the Penal Code and the sentence of 15 years imprisonment passed on him by the court below are affirmed. I